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In the Supreme Court of the United States

No. 422.
OCTOBER TERM, 1964.

FEDERAL TRADE COMMISSION,
Petitioner,
v.
CONSOLIDATED FOODS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AMICUS CURIAE OF EATON MANUFACTURING COMPANY and Motion for Leave to File.

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MOTION OF EATON MANUFACTURING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Eaton Manufacturing Company moves the Court for leave to file in this case, as an *amicus curiae*, the brief annexed.

The Solicitor General has consented to the filing of this brief, but respondent, Consolidated Foods, has refused to consent.

This is the first case to come to this Court alleging "reciprocity" as a violation of § 7 of the Clayton Act. 15 U. S. C. 18. Whether the statute applies to such cases is, therefore, matter of importance. Consolidated Foods, however, has elected not to challenge the Solicitor General's contentions concerning the reach of § 7. Eaton believes that, before the Court fixes the meaning of § 7 as

applied to cases of this type, the Court should consider whether such case falls within the statute at all. Eaton accordingly desires to bring its views concerning the statute to the Court's attention.

Additionally, Eaton points out, the Court has already received an *amicus curiae* brief filed, with the consent of all parties, by Trabon Engineering Corporation and two of its distributors. Trabon and its two distributors have sued Eaton in the United States District Court in Cleveland for an asserted violation of § 7 of the Clayton Act, and they here assert that (p. 2 of the Trabon brief) there is a "close parallel between" this case and their suit against Eaton, and that "the basic principles involved are the same." Eaton does not believe the Court should be asked to rule on the reach of the statute on what amount to *ex parte* representations.

Eaton prays, therefore, that it be given leave to file the brief annexed.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF EATON MANUFACTURING COMPANY.

INTEREST OF EATON MANUFACTURING COMPANY AS AMICUS CURIAE.

This brief is tendered by Eaton Manufacturing Company as an *amicus curiae*.

Eaton has been sued, in Federal Court in Cleveland, by Trabon Engineering Corporation and two of its distributors (in whose behalf a brief *amicus curiae* has been filed in this case) for asserted violation of § 7 of the Clayton Act.[1] Eaton does not agree the suit against it will necessarily be controlled by the decision in this case, but, in view of Trabon's, and the Government's, efforts to give the statute a construction, unwarranted as Eaton contends,

[1] Civil Action No. 62-882 on the docket of the United States District Court for the Northern District of Ohio.

which could affect the case to which it is a party, Eaton invites the Court's attention to considerations it thinks the Court should have in mind in fixing the statute's meaning.

STATUTE INVOLVED.

This case turns on § 7 of the Clayton Act. 15 U. S. C. 18. It specifies:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

QUESTIONS PRESENTED.

Eaton does not believe the question the case presents, as stated either by the Government or by Trabon, focuses attention on the issues at stake. Eaton suggests that the questions at bar are four:

1. Whether § 7 of the Clayton Act is concerned at all with passive, or, as the Government puts it, "accommodative" reciprocity, unaccompanied by coercive acts or contractual commitments.
2. Whether the Federal Trade Commission applied an erroneous standard in condemning the merger.
3. Whether the Court of Appeals correctly held eight years of post-acquisition experience proves the Commission's fears groundless and shows the acquisition had no substantial market impact.
4. Whether the factual record shows that, under any construction of the statute, and no matter what the standard, this merger did not, and could not, bring about any anti-competitive effect condemned by the statute.

Consolidated has argued the last three points but has concentrated its heaviest fire on the fourth question. It has, as Eaton believes, demonstrated that, no matter how the statute is read or what the standard applied, support for the Commission's conclusion cannot be dredged up from this record.

In this brief Eaton will deal only with the first three questions.

SUMMARY OF ARGUMENT.

1. Section 7 of the Clayton Act is not concerned with "reciprocity," unaccompanied by coercive acts or contractual commitments. Absent coercive conduct, reciprocity is neutral and without meaning under the statute. If it is accompanied by coercive acts stifling competition, it is a misnomer to describe submission to it as "reciprocity." Where nothing more is shown than what the Government terms "accommodative" reciprocity, there is no violation of the statute.

2. The Commission applied an erroneous standard in condemning the merger. Although paying lip service to the "probability" of harm, the Commission dealt with the assumed existence of power, and not with its exercise or with its effects. The Government's attempt to uphold the Commission rests upon unrealized possibilities of anti-competitive effects, and is at variance with this Court's cases.

3. Post-acquisition evidence of eight years shows that the merger has had no anti-competitive effect in the market place.

ARGUMENT.

The Court in this case is, for the first time, called upon to condemn a merger under § 7 of the Clayton Act on the ground it provides opportunity for "reciprocity." The Government argues that "the simple idea"—and so it is described by both Government and Commission—encompassed in the thought that "I will buy from you if you will buy from me"—without more—taints a merger. The Government and the Commission say that § 7 condemns even the "unspoken" hope that:

> "If I buy from him, he will buy from me." [2]

The Government calls this "accommodative" reciprocity. (Government's brief, pp. 12, 20, 23, 24, 25.)

This kind of thing the Government condemns even though it springs, as the Government puts it (p. 20) merely from:

> " 'the propensity to show gratitude to those who have favored a seller with orders.' "

Actually—

I. IT IS MISLEADING TO SPEAK OF "RECIPROCITY" IN TERMS OF SECTION 7—THE STATUTE IS NOT AIMED AT THAT KIND OF CONDUCT.

Section 7 of the Clayton Act is concerned with artificial clogs in the channels of trade. 15 U. S. C. 18. It deals with overt exertions of economic muscle. It condemns coercive acts and contractual commitments of like effect. But coercive conduct of that kind can hardly be described as an exercise in "reciprocity." One who bows to the bludgeoning of superior economic power cannot—

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[2] See the Government's brief, *e.g.*, pages 8, 20, 24.

in any usage faithful to the English language—be deemed to engage in an act of "reciprocity."

It is a misnomer—more, a contradiction in terms—and confuses rather than clarifies, to speak of "reciprocity" under § 7. Unaccompanied by any overt coercive act or contractual arrangement, "reciprocity" is without meaning, and entirely neutral, so far as concerns § 7. On the other hand, accompanied by coercive acts, it is no longer "reciprocity"—but quite the opposite.

Important as it is to keep channels of trade free of coercive obstacles, it is equally important that the statute be not given so large a reading as to sweep into it even non-coercive behavior in the market place. This is so because—

1. Fear Sprung From Uncertain Reading of Statute Would Itself Clog Trade.

The Government confesses (p. 28) it is unprepared to suggest a formula to identify the "reciprocity"—*i.e.*, pure reciprocity unaccompanied by coercive conduct—it would condemn. It concedes that overt acts can be controlled by injunctions and cease-and-desist orders, but (p. 24):

> "No injunction can prevent Company *B* from deciding that it would be in that company's best interests to favor the products of Company *A*, which may thereby become *B*'s customer; and no cease-and-desist order can effectively enjoin Company *A* from then placing an order with Company *B* because of the 'predilection * * * to show gratitude to those who have favored [*A*] with orders.'"

The Government, considering such conduct wicked, proposes to control it by condemning the merger.

If this is the construction to be put on the statute, then, for the words of the act, is substituted a Government officer's whim. This would be no service to the cause of free competition. It would instead introduce paralyzing uncertainty.

If this is what § 7 condemns, on what basis could any businessman form any judgment as to the lawfulness of his conduct? On what basis could any lawyer advise any client concerning the validity or invalidity of any merger?

The nourishing tides of competition will not be served by guidelines that plunge business transactions into uncertainty.

Moreover—

2. Weapons Exist to Curb Coercive, Overt, Anti-competitive Conduct.

There is no need to convert § 7 into rubber. The Government concedes (p. 15) that if conduct it mistakenly calls "reciprocity"—but is its opposite—is coercive, it is unfair competition forbidden by § 5 of the Federal Trade Commission Act. 15 U. S. C. 45. If it is contractual, it is a restraint of trade forbidden by § 1 of the Sherman Act. 15 U. S. C. 1. If it is monopolistic in character, it is forbidden by § 2 of the Sherman Act. 15 U. S. C. 2. If it invokes a tying arrangement or is conditioned on agreement not to use the wares of a competitor, it is forbidden by § 3 of the Clayton Act. 15 U. S. C. 14.

There is plainly no shortage of weapons to keep the channels of trade clear. There is no need of yet another remedy. But there is need *not* to bring within § 7 conduct at which the statute can hardly have been aimed.

3. If Need Exists to Legislate Concerning "Reciprocity" That Is Work for Congress.

Nothing in the legislative history so much as hints that the evil at which the statute was aimed even remotely concerned reciprocity—non-coercive and non-contractual. Congress could not have been ignorant of the role of reciprocity in the sale of goods, for reciprocity is at least as old as Adam Smith, and probably as old as human nature.

Congress did not deal with conduct so nebulous. Instead, throughout the antitrust laws, Congress dealt with overt and coercive acts.

If it now be thought that something less—reciprocity alone—is an evil and ought to be forbidden, there is a remedy. Congress sits.

In summary—on this point, *i.e.*, the reach of § 7—the Court should reject the Government's argument that a merger may be condemned under § 7 on the ground that, at most (p. 30), it created a power to extort or attract reciprocal purchases, or that (p. 31) it provided opportunity for exercise of such power. The Government contends (p. 43) that the Court should focus on whether a power exists, and not on whether it has been exercised. Congress, however, drew the line, *not at the existence of power* to affect competition, *but at its abuse.*

II. COMMISSION CONDEMNED MERGER BY APPLYING ERRONEOUS STANDARD.

Although § 7 of the Clayton Act, 15 U. S. C. 18, condemns acquisitions, the effect of which "may be" substantially to lessen competition, it is clear enough that possibilities are not the statute's concern. *Brown Shoe Co., Inc. v. United States* (1962), 370 U. S. 294, 323; *United States v. El Paso Natural Gas Co.* (1964), 376 U. S. 651, 658-659. The Government, however, would sustain the Commission's decision condemning the merger on the ground (p. 30) "it gave Consolidated 'the power to extort or simply attract reciprocal purchases from suppliers' * * *."

This will not do.

The Government's construction would give the statute a new direction, at variance with this Court's cases.

Although the Government makes a passing bow to the need to demonstrate probabilities, its main effort—because forced to it by the Commission's decision—is to condemn the merger on the ground (*e.g.*, pp. 10, 23, 31, 34) it created "opportunities for reciprocal buying." The Government seemingly deems it (p. 34) the function of § 7 to remove "temptation." Therefore, the Government asks the Court to focus attention (p. 43) "not on whether the anti-competitive power is exercised, but on whether the power exists," and asserts (pp. 43-44) that, *even if there were no exercise of the power*, this "would be irrelevant."

In view of these arguments, based on the statutory "may be," it will be useful to note that from the beginning the Court has insisted that what "may" happen is *not* enough. The Court first met the statutory condition condemning specified conduct where the effect "may be" to

substantially lessen competition, in *Standard Fashion Company v. Magrane-Houston Company* (1922), 258 U. S. 346. This was the Court of Taft, McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis and Clarke. And at the bar, as an antagonist, appeared Mr. Charles E. Hughes. The Court was squarely called upon to say whether the statute prohibited those transactions which could or might bring about the prohibited evils, or whether it was directed only at those which in fact had produced those evils or probably would bring them about.

To be sure, *Standard Fashion* arose under § 3 of the Clayton Act. However, the language there before the Court, forbidding conduct "where the effect * * * may be to substantially lessen competition" is the same as that in § 7 now before the Court.

The way the Court there met the problem is relevant here because, as the Court has pointed out, "the tests of illegality under amended § 7 'are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.'" *United States v. Philadelphia National Bank* (1963), 374 U. S. 321, 365; *Brown Shoe Co., Inc. v. United States* (1962), 370 U. S. 294, 329.

Standard Fashion is particularly relevant here because the Court there rejected the argument by which the Government would condemn the merger now at bar. In *Standard Fashion* the District Court had held (254 Fed. 493, 499):

> "it is the duty of the court to determine whether or not the contract *has provided means* for a real or substantial lessening of competition, *irrespective of what use has been or is being made of these means.*"[3]

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[3] Emphasis supplied throughout the brief.

This, it will be observed, is precisely the argument the Government now makes in the case at bar.

The District Court's view was that (254 Fed. at 499):

> "By the use of the word 'may' the intent is manifest *to deal with the potential evil* which a contract may contain, and to make *the attempt* to substantially lessen competition unlawful."

An appeal followed in *Standard Fashion Co. v. Magrane-Houston Co.* (1 C. A., 1918), 251 Fed. 559. That court refused to consider whether the Clayton Act was violated, holding merely that under ordinary principles of equity the negative covenant was not enforceable anyway.

Standard Fashion Company thereupon sought, and obtained, a rehearing in the Court of Appeals on the ground the court had decided the case on a point not argued and not suggested by the opinion below, and not even raised by defendant, it having predicated its defense on the ground the contract violated the Clayton Act and was therefore unenforceable. On the rehearing, *Standard Fashion Co. v. Magrane-Houston Co.* (1 C. A., 1919), 259 Fed. 793, the court changed its mind and found that, except for the Clayton Act, the contract would be enforceable by injunction. It therefore had to decide what it previously had refused to decide—whether the contract violated the Clayton Act.

Standard Fashion Company argued that despite the statutory "may be" the challenged conduct could not be condemned unless it in fact would substantially lessen competition, or would in all reasonable probability do so. This is the view that ultimately came to prevail concerning the meaning of the statutory "may be." However, the

Court of Appeals, when forced to the choice, rejected that construction of the statute. It said (259 Fed. at 798):

> "Observe at the outset that the condemnation of the statute runs, 'where the effect of' such negative covenant '*may be* to substantially lessen competition or *tend* to create a monopoly.' The language is '*may* be,' not 'is' or 'will be.'
>
> In order to condemn the negative covenant, it is not necessary that the court should find that it *will* lessen competition or *will* tend to create a monopoly; it is enough to find that it *may* lessen competition or *may tend* to create a monopoly."

The Court of Appeals thereupon affirmed because (259 Fed. at 798):

> "the negative covenant in this contract *may* lessen competition, or *may* tend to create a monopoly, or both, and is therefore obnoxious to the Clayton Act."

Brown, J., specially concurring, was unwilling to put so absolute a construction on the statute. His view was that (259 Fed. at 801):

> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability.' "

Judge Brown added (259 Fed. at 801):

> "In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the city of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it

was incumbent upon it to allege and prove such facts as would enable the court to make a reasonable prediction of consequences."

Judge Brown concluded that (259 Fed. at 801) "this court should not, upon this record and upon so incomplete a state of proofs, determine the invalidity of this contract." He agreed, however, that there would have to be an affirmance, not because the contract was shown to be invalid under the Clayton Act, but because plaintiff was not, as held in the court's former opinion, entitled to an injunction anyway to enforce that contract.

This Court took the case for review and explained, 258 U. S. at 353, "The principal question in the case and the one upon which the writ of certiorari was granted involves the construction of § 3 of the Clayton Act * * *."

Solicitor General Beck, at the Court's direction, appeared in the case as *amicus curiae*. He contended that what Congress did by the statute was to say to the courts (see the Solicitor General's brief in that case, No. 20, October Term, 1921, p. 12):

> "You shall declare these conditions illegal where you can see that their operation presents a possibility of a certain kind. The possibility is not one of merely lessening competition. But you must, acting in the discharge of your judicial responsibility, see that there is a possibility of a 'substantial' lessening of competition."

The Court will observe that, except for modest lip service to "probability" now paid by the Commission and the Government, this is substantially what the Commission held in the case at bar and it is substantially the basis on which the present Solicitor General argues that the merger ought to be condemned. The Court rejected the

argument—unanimously. The Court said (258 U. S. at 356):

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But *we do not think that the purpose in using the word 'may' was to prohibit the mere possibility* of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or create an *actual* tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

As has been seen, the rule of *Standard Fashion* concerning the meaning of the statutory "may be" has endured through this Court's latest decisions.

Now, the point is, not that the Court is apt to abandon the rule of nearly half a century's standing, but that the fact alone that the Government is compelled to suggest the Commission's decision ought to be sustained to protect Consolidated from "temptation" demonstrates that the Commission, in adjudging the ultimate penalty of divestiture, has applied an erroneous standard.

III. EIGHT YEARS' POST-ACQUISITION EVIDENCE DEMONSTRATES MERGER DID NOT, AND COULD NOT, ADVERSELY AFFECT COMPETITION.

Section 7 of the Clayton Act, to be sure, speaks prospectively.

But this is no reason to close one's eyes to the proof, now certified by the Court of Appeals, as to the impact of the merger on competition. The problem, although it here arises in an antitrust context, is no different than that encountered in other areas of the law. Surely it is idle to speak, as in a vacuum of eight years ago, of "probabilities" when proof is available.

In any case, it has not been the practice of this Court in such situations to ignore relevant, and persuasive, evidence. For example, in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.* (1933), 289 U. S. 689, in dealing with essentially the same kind of problem, although in a different context, the Court pointed out that prophecy and opinion is often the only evidence available. But, as Mr. Justice Cardozo, speaking for the Court—making a point particularly relevant here—went on to say (p. 698):

> "a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within."

Here the Court of Appeals has examined that book. And it has concluded that, although evidence by the volume there is, none of it discloses any prohibited impact on the market place.

As the analysis of the Court of Appeals shows, one looking for an evil impact upon competition will here be reminded of the experience of Mr. Justice Chaussepied in *Pyrot's* case, as recorded in Anatole France's reports. There, as will be recalled:

> "the Pyrot case having been presented to the Supreme Court by the Keeper of the Seals, it fell to Chaussepied to examine it and discover its defects, in case any existed. Although as upright and honest as a man can be, and trained by long habit to exercise his magistracy without fear or favor, he expected to find in the documents to be submitted to him proofs of certain guilt and of obvious criminality. After lengthened difficulties and repeated refusals on the part of General van Julep, Justice Chaussepied was allowed to examine the documents. Numbered and initialed, they ran to the number of fourteen millions six hundred and twenty-six thousand three hundred and twelve. As he studied them the judge was at first surprised, then astonished, then stupefied, amazed, and, if I dare say so, flabbergasted. He found among the documents prospectuses of new fancy shops, newspapers, fashion-plates, paper bags, old business letters, exercise books, brown paper, green paper for rubbing parquet floors, playing cards, diagrams, six thousand copies of the 'Key to Dreams,' but not a single document in which any mention was made of Pyrot." [4]

Here, as the Court of Appeals has shown, not only is the record barren of proof of harm, but the weighty evidence of eight years of experience shows it is not even to be expected.

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[4] PENGUIN ISLAND, Book Six, Chapter X.

CONCLUSION.

The Court of Appeals correctly reversed, and its judgment should be affirmed.

Respectfully submitted,

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